



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Michael A. Uhorchak - Waiver of Overpayment of Salary
File: B-223381
Date: April 28, 1987

DIGEST

Former Panama Canal Company employee, a Pharmacist, NM-11, step 6, applied for and was selected to fill a career development position, Management Analyst, NM-9, step 10. He erroneously continued to receive pay at the NM-11, step 6, grade level although precluded from pay retention by the provisions of 5 U.S.C. § 5363(c)(3), since he was demoted at his own request. There is no evidence of fraud, misrepresentation, or lack of good faith on the part of the employee. The employee was informed by agency officials that he was entitled to "saved pay" and was not counseled as to the financial consequences of his voluntarily requesting a reduction in grade. Thus, employee reasonably believed he was entitled to continue to receive salary at the NM-11, step 6, grade level, and an increase in salary based upon the comparability pay increase. Accordingly, he was not at fault and waiver of the overpayment of salary is granted.

DECISION

This decision is in response to an appeal by Mr. Michael A. Uhorchak, a civilian employee of the Department of the Army, requesting waiver of an overpayment of salary in the gross amount of \$2,392, under the provisions of section 5584, title 5, United States Code, 1982. By settlement Z-2858675, dated May 1, 1985, our Claims Group denied waiver. For the reasons stated in this decision, the settlement of the Claims Group is overruled and collection of the overpayment of salary to Mr. Uhorchak is waived.

FACTS

Pursuant to the ratification of the Panama Canal Treaty of 1977, Mr. Uhorchak was transferred from the Panama Canal Company (PCC) to the Department of Defense, along with the functions of the PCC, as a Pharmacist NM-11, step 6, effective October 1, 1979. Subsequently, Mr. Uhorchak applied

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for and was selected to fill the position of Management Analyst NM-9, a position with promotion potential to NM-11. A personnel action, Standard Form (SF) 50, was issued and showed a change to a lower grade from Pharmacist NM-11/6 at \$27,652.90 per annum, to Management Analyst NM-9/10 at \$25,469.05 per annum, effective October 5, 1980.

Mr. Uhorchak was not entitled to pay retention since an employee who is demoted at his or her own request is precluded by statute from such benefit. 5 U.S.C. § 5363(c)(3) (1982). However, the Army in processing the employee to the lower-grade level, failed to decrease his salary. In fact, Mr. Uhorchak's salary was increased due to the 1980 comparability pay increase granted to Federal employees. The error resulted in an approximate overpayment of \$92 each pay period for 26 pay periods, from October 5, 1980, to October 3, 1981. The overpayment was discovered during the processing of the October 1981 comparability pay increase.

Mr. Uhorchak states, and the agency does not deny, that he did not receive a copy of the SF 50. The employee received a copy of DA Form 2515 (Payroll Change Slip) dated October 5, 1980, which showed his correct grade, step, and annual salary. Although the employee's lower grade and step were correctly reflected on his DA Form 2515, his salary was erroneously increased to \$14.51 per hour, and \$30,180.80 annually, which is the amount he would have received had he retained the salary level of his NM-11, step 6, position, along with the 1980 comparability pay increase. The Army contends that if Mr. Uhorchak had compared his DA Form 2515 with his Leave and Earnings Statement (which the employee states he received), and mathematically computed his hourly rate of pay from his annual salary, then he would have noticed the discrepancy. Thus, waiver was denied.

Mr. Uhorchak states that he was not counseled as to the impact of his accepting a downgrade into a different career level position and was informed by agency officials that he was entitled to saved pay. Since he continued to receive the pay of a NM-11, his previous grade, he saw no reason to question his pay.

Our Claims Group concluded that a reasonable employee should have compared his leave and earnings statements and his DA Form 2515, noticed the discrepancies, and taken corrective action. His failure to do so, according to the Claims Group, precludes waiver of the claim.

OPINION

Under the provisions of 5 U.S.C. § 5584 (1982), the Comptroller General of the United States may waive, in whole or in part, a claim of the United States against a person arising out of an erroneous payment of pay to an employee of an agency when collection would be against equity and good conscience and not in the best interests of the United States. The implementing regulations are contained in 4 C.F.R. Parts 91, 92, and 93 (1986). Section 91.5(c) provides that the criteria for waiver are generally met by a finding that the erroneous payment of pay occurred through administrative error and there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee. A grant of waiver of an overpayment of pay must be based upon the facts involved in the particular case under consideration.

In the case before us, the overpayment resulted from an administrative error in paying Mr. Uhorchak at a rate of pay in excess of the rate to which he was entitled. Further, there is no evidence of fraud, misrepresentation, or lack of good faith on the part of Mr. Uhorchak. The basic question, therefore, is whether Mr. Uhorchak was at fault; that is, whether he should have recognized the administrative error by comparing the various documents he received, discovered the discrepancies in his pay, and taken corrective action.

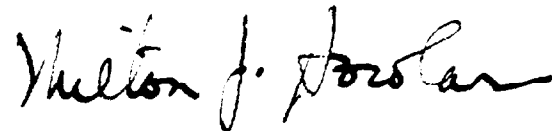
This Office has interpreted the word "fault," as used in 5 U.S.C. § 5584, as including something more than a proven overt act or omission by the concerned employee. Thus, we consider fault to exist, if, in light of all the facts and circumstances, it is determined that the employee knew or should have known that an error existed, and should have taken appropriate action to have it corrected even though the error was caused initially by others. The general standard utilized is to determine whether a reasonable person would have been aware of the existence of an overpayment. See 4 C.F.R. Part 91. See also Price v. United States, 621 F.2d 418 (1980).

Under the circumstances involved in this claim, we do not believe that any fault or negligence may be imputed to Mr. Uhorchak so as to preclude waiver of the overpayment of pay. Mr. Uhorchak states that he was informed by agency officials that he was entitled to "saved pay," that is, he was entitled to continue to receive his annual salary at the NM-11, step 6, grade level for 2 years. The agency does not deny this statement. Therefore,

he reasonably concluded that he was entitled to continue to receive his salary at the NM-11, step 6, grade level and receive an increase in salary based upon the comparability pay increase. See Violet M. Whited, B-222763, February 24, 1987. We also note that Mr. Uhorchak was not counseled by agency officials concerning the financial consequences of his voluntarily requesting a reduction in grade from Pharmacist, NM-11, step 6, to Management Analyst, NM-9, step 10.

In determining whether the actions by an employee are reasonable under the circumstances, we take into consideration such matters as the employee's position, knowledge, experience, and length of service. Joyce G. Cook, B-222383, October 10, 1986; Carolyn Wertz, B-217816, August 23, 1985. Here, although Mr. Uhorchak had approximately 10 years of Federal service, he was a Pharmacist, and similar to the employee in Cook, supra, did not possess any specialized knowledge of the Federal pay system and the statutory provision pertaining to saved pay.

Accordingly, in light of the circumstances of this case, we conclude that Mr. Uhorchak was not at fault in the creation and continuation of the overpayment of pay. Therefore, waiver of the overpayment of salary, in the gross amount of \$2,392, is granted.

for 
Melton J. Jordan
Comptroller General
of the United States